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80-1649

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORVILLE LEON PAYNE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

From THE SEVENTH CIRCUIT COURT OF APPEALS,
From THE SOUTHERN DISTRICT COURT OF INDIANA
New Albany Division, Judge CALE J. HOLDER
PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Was defendant denied effective assistance of Counsel?

2. Was prosecution of defendant barred by the statute of limitations?

3. Was court required to grant mistrial when codefendants plead guilty after voir dire of jury?

4. Should government have been permitted to cross examine defendant's witness with respect to whether they knew "that defendant had been previously convicted of a misdemeanor", where defendant had appealed that convicted of a misdemeanor", where defendant had appealed that conviction and the appeal was pending and was subsequently reversed? (Rule 609)

5. Did court err in excluding relevant evidence?

6. Did the court err in allowing a witness for the defendant to be impeached by proof of a prior misdemeanor conviction? (Rule 609, again)

7. Was defendant denied due process as guaranteed by the 6th Amendment upon sentencing with reliance upon erroneous presentence investigation report.

8. Was indictment fatally defective because overt acts of 1978 do not state a 18 USC 2312 or 2313 crime and does not meet constitutional requirements for a one count conspiracy?

THE PARTIES TO THE PROCEEDING

These are all shown in the caption of the case.

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Title 18 U.S.C. 3282

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Title 28 Federal Rules of Evidence, Rule 609

Title 28 Federal Rules of Evidence, Rule 615

Constitution of the United States, 5th Amendment

Constitution of the United States, 6th Amendment

Black's Law Dictionary, Definition of Continous:

"Uninterrupted; unbroken; not itermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series."

REFERENCE TO THE OPINION BELOW

This case was appealed from the SOUTHERN DISTRICT COURT OF INDIANA, New Albany Division to the 7th Circuit Court of Appeals, Chicago, Illinois. The 7th Circuit's decision is reported at 79-2393 and 79-2561 which appears in appendix I.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgement of the 7th CIRCUIT COURT OF APPEALS was entered on December 10, 1980. The lawyer of record informs Payne that the rehearing en banc was denied on February 2, 1981. This petition for a writ of certiorari will be filed within sixth (60) days of the 7th Circuit's decision of refusing a en banc hearing. This court's jurisdiction is invoked under 28 U.S.C. section 125 4.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

TITLE 18 U.S.C. 2

2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsel, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which of directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, C. 645, 62 Stat. 684; Oct. 31, 1951, c. 655 17b, 65 Stat. 717

TITLE 18 U.S.C. 10

10. INTERSTATE COMMERCE AND FOREIGN COMMERCE DEFINED

The term "interstate commerce", as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

The term "foreign commerce", as used in this title, includes commerce with a foreign country.

June 25, 1948, c. 645, 62 Stat. 686.

TITLE 18 U.S.C. 371

371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof on any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

TITLE 18 U.S.C. 2311

2311. DEFINITIONS

As used in this chapter:

"Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails;

BLACK'S LAW DICTIONARY DEFINITIONS OF:

CONTINUOUS. Uninterrupted; unbroken; not intermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series. Ingraham v. Hough, 46 N.C. 43. Connected, extended, or prolonged without cessation or interruption of sequence. Sullivan v. John Hancock Mut. Life Ins. Co. of Boston, Mo. App., 110 S.W. 2d, 877.

As to continuous "Crime" and "Easements," see those titles.

TITLE 18 U.S.C. 2312

2312. TRANSPORTATION OF STOLEN VEHICLES

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 806.

TITLE 18 U.S.C. 2313

2313. SALE OR RECEIPT OF STOLEN VEHICLES

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 806.

TITLE 18 U.S.C. 3282

3282. OFFENSES NOT CAPITAL

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is istituted within five years next after such offense shall have been committed.

June 25, 1948, c. 62 Stat. 828; Sept. 1, 1954, c. 1214, 12(a), formerly 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub.L. 87-299, 1, 75 Stat. 648.

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Pub.L. 93-595, 1, Jan. 2, 1975, 88 Stat. 1931

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All Relevant Evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Pub.L. 93-595, 1. Jan. 2, 1975, 88 Stat. 1931.

TITLE 28 U.S.C. RULES OF EVIDENCE

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded of its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pub.L. 93-595, 1, Jan. 2, 1975, 88 Stat. 1932.

TITLE 28 U.S.C. FEDERAL RULES EVIDENCE: RULE 609

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless

the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Pub.L. 93-595, 1, Jan. 2, 1975, 88 Stat. 1935.

TITLE 28.U.S.C. FEDERAL RULES OF EVIDENCE: RULE 615

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its at-

torney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Pub.L. 93-595, 1, Jan. 2, 1975, 88 Stat. 1937.

AMEND. 5 CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMEND. 6 CONSTITUTION

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The action was instituted by filing of a miltiple count indictment against the petitioner and six other co-defendants. Payne runs one business of his own, Surber runs a business of his own, the three Spencer brothers run a business that they own, J. Scott lives in Louisville, Kentucky, and Heuser

lives somewhere around the Louisville, Kentucky area. Spencers' place of business is about 12 miles from Payne's. Surber's place of business is about 2 miles from Payne's. Louisville, Kentucky is about 35 miles from Payne's.

Payne went to trial on a one count conspiracy (18 U.S.C. 371) with underling offenses of 18 U.S.C. 2312 & 2 and 2313 & 2. There has not been any substantive charges ever filed against Payne. There was one group (1 thru 5) of overt acts that had to do with a 1973 Buick in Jan. 1974. The second set of overt acts was a group (6 thru 10) that had to do with a 1972 Ford in May 1974. The Statute of Limitations Date was August 22, 1974. In the third group of overt acts (16 thru 19) the government alleged there was a truck stolen in Louisville, Kentucky and delivered to a body shop in Louisville, Kentucky after which some of the parts were alleged to have been delivered to Indiana. There was no allegation that all of the parts were delivered to Indiana.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

QUESTION 1

1. Denial of effective assistance of Counsel.

"Spencers are being represented by the same two counsel". "...Mr. Payne and Mr. Surber, are represented by the same three counsel."

"We would be satisfied if the Court would inquire individually of these five defendants--they have various potential conflicts--and make a record that they would consent to having their counsel represent other co-defendants." By U.S. Att.

Surber and Payne were questioned about if there were any conflicts of interest; both Payne and Surber agreed that we wanted the combined help of the three attorneys.

Without Foster warnings or any explanation whatsoever the Court seperated the representation to Payne with Erbecker and Surber with Burton and Southerland.

The 3 Spencer brothers were permitted to continue with their two attorneys.

After voir dire of the jury and after which Surber plead guilty to one count of the indictment with the condition that

he would not testfy against Payne, Burton and Southerland returned to help represent Payne. The Court instructed them to leave. Later, U.S. Assistant Attorney threaten Burton with taking him before a disciplinary committee if he didn't cease investigative efforts for Payne.

Attorneys Burton and Erbecker told Payne, off the record, that Burton would be there to assist because Payne knew at that time that it was impossible for him to communciate with Erbecker. Like he could communicate with Burton. Payne would not enter a trial with only one attorney to represent him. If the court had been doing a "fair play" situation, this separation of counsel would have taken place some time prior to trial so that Payne could have had ample time to lood elsewhere for another attorney, which Payne would have done.

The following is a list of reasons why there was denial of effective assistance of counsel:

A. Lawyer did not appeal the decision of the Court to the 7th circuit when there was a denial of request for a bill of particulars. Had to start trial without knowledge of what was the identification of motor vehicle.

B. Lawyer did not request more preemptitory challenges. Payne had to go to trial with only one exercised for him.

C. After Payne was separated from his attorney Burton there were four people (FBI, State Police & two Attorneys) people at the government counsel table with only two at the defense table. Contrary to FRCP Rule 615; lawyer did not quote the rule nor ask for time to look up the law.

D. Erbecker has had treatments before trial and has been admitted to the Lady of Peace or some Mental Institutions since the trial.

E. Counsel should have asked for a mistrial after the other defendants plead guity, after the voir dire of jury, after the jury was read the entire indictment, but he failed to do so. Payne had to go to trial with prejudicial jury. Further, Payne owed money to one of the jurymen by the name of Mr. Singer. Erbecker did not ask for continuance to look up the law.

F. Erbecker did not prepare for the case which is shown by the fact that he did not interview my defense witness before the trial. Look at R. Fox testimony, as well as others.

G. At about fifteen or twenty minutes before the start of the trial on Monday morning, Oct. 8, 1979 the government gave out about 375 pages of discovery material which was post

dated back to Oct. 4, 1979. Erbecker never ask for nor received any continuance to study this new information.
H. At no time after any government witness was examined, did Erbecker ask for any 3500 discovery material.
I. On October 8, 1979 The Attorney for Terry Heuser asked for a continuance to study the 375 pages of material just received; the Court denied the request. October 8, 1979 was the first day of trial and Terry Heuser was still going into the trial, at least until after the noon recess was called.
J. Erbecker did not ask for a change of District so that defendant could get a jury that had not previously heard about the case on national TV, read about it in the newspaper, and or heard about it on the radio. One juryman said that he read the newspaper daily and it was reported in the Louisville Courier Journal on at least two days of the trial.
K. During the Hines testimony, Erbecker did not object at proper times nor did he ask for any 3500 material, after his testimony, such as notes that were made at or after interviews that the FBI had with Hines.
L. Payne sent Burton to Louisville to locate two people that plays an important part in the fact that they are highly important witnesses for the defence; Burton returned to say that he could not find them in Louisville. During the course of the trial, one name appeared as Ed McMahon and the other man was not located until after my inceration at Lexington FCI. Payne used the telephone information operator to locate the man.
M. Due to fact that I could not produce this James G. at the trial, all of the other information to prove that Hines testimony is based upon material falsehoods was denied from being put before the jury; this is a direct failure on part of the counsel. Payne is positive that had Burton not been removed from my counsel, that this proof would have been presented. Payne was lacking in total proof of his innocence in only one place at trial time; it was all available except the one James G.
N. Payne's counsel failed to perform as an effective assistant by not using the FBI to help locate this James G. during the course of the trial.
O. Here again Payne was denied effective assistance of counsel by Erbecker refusing to let Payne take the stand in his own behalf. Had Payne taken the stand, Payne would have

been in the court room by himself without any counsel.
P. With proper preparation, there could have been evidence introduced to show that every major statement made by Hines was materially false.
Q. Erbecker did not during the entire course of the trial mention any thing to do with 28 U.S.C. Federal Rules of Evidence, Rule 609 or 615 or any other rule that exist.
R. Without knowledge of Rule 609, how could one attorney object to the questioning of Lucas about the Misdemeanor Jackson County Chevrolet truck case. Erbecker did not ask for a continuance to look up the law on the situation.
S. At the time of serarating the witness, Erbecker did not being up Rule 615 about preventing the second police official from setting at the government counsel table; not did he ask for a continuance so that he could look up the law on the situation. He did Say..."I've never seen that happen before." This was highly prejudicial in the case because during Arnold's testimony Hays was identified as the arresting officer when he was, in fact, not the arresting officer in regards to the Indiana Police arresting Arnold Howard for "following too closely". Ticket issued arrest time show another officer as arresting officer.
T. Erbecker didn't object to court's theory that "only one overt act" had to be proven in order to prove the conspiracy. Erbecker didn't show case law to court to prove that one overt act had to occur after the statute of limitations date of August 22, 1974.
U. Erbecker didn't object to the fact that Hayes testified that "paint color" of truck cab was positive identification, in his opinion, of the truck cab in regards to the 1978 overt acts. There is no way that "paint color" identifies anything because Ford Motor Company makes thousands of any one particular color of cabs for Ford trucks. Erbecker didn't object.
V. When Hines testified that Your Honor, Judge Holder, had been the judge in the case when Hines plead guilty to one count of a four count indictment with the agreement that he would testify in this trial involving Payne. This is contrary to having a court that is inpartial. Judge Holder could not have listened to the plea bargain agreement with Hines without having prejudicial beliefs about Payne. Erbecker did not ask for a mistrial as a result of this information nor did he ask for continuence to "look up the law" on this point.

W. Did not emphasize the one work "continuous" as he should have. Did not explain to jury what the definition is of continuous.

X. During Hines testimony U.S. Attorney knew about Rule 609 but failed to follow Rule 609 when Lucas and Arnold Howard were on the stand testifying. Erbecker failed to observe this fact that a misdemeanor of less than one year can not be brought up as it was during the testimony of Arnold Howard and Mr. Lucas. Erbercker again failed to ask for continuence so that he could "look up the law."

Y. Erbecker said that the Presentence Investigation Report errs were not important, but Payne has spent and will spend many days in prison because of the improper Presentence Investigation Report.

Z. Erbecker said that government didn't have to prove agreement etc. Which is unbelievable for an attorney to say that has just gone through a conspiracy trial. This shows total lack of competence in an attorney.

During the above discussion about the denial of effective assistance of counsel there is no way to determine what would have happened if Payne had been permitted to have other two additional attorneys as his counsel. Payne paid for services of three attorney's; Payne received the service of one attorney. This is like one person can pick up one hundred pounds, it is very similar here, Payne was denied the assistance of the last two counsels which would have emened up the government team (four people) with Payne's team (four people). It made the task impossible for one person acting as attorney for Payne. See Appendix A for "cities", etc. in regards to this question.

Payne contends that with the above representation of counsel that the trial was a mockery of justice.

QUESTION 2

Reason relied on for the allowance of the Writ

2. Prosecution of defendant was barred by the statute of limitations. Title 18 U.S.C. 3282 says to not prosecute beyond the five (5) year period of time which would be the time period

from August 22, 1974, until August 22, 1979. Therefore overt act one through ten are beyond the statute of Limitations date of August 22, 1974. Overt Acts one through ten and sixteen through nineteen were presented to jury by the government.

Blockberger v. U.S., 284 U.S. 299 states that in order to determine if there is one crime or two crimes then a person must answer the question does one have to prove two sets of facts or just one set of facts. The indictment shows in overt acts one through five that one car is stated in January 1974 acts while another car is stated in overt acts six through ten that are in May, 1974 (Both are beyond the Statute of Limitations): while the May 1978 acts are four years later but $978 overt acts shown in sixteen through nineteen does not state a federal crime.

It is not a continuous crime because the very definition of continuous srops that idea at the first word in the Black's Law Dictionary definition of continuous: Uninterrupted. Four years is bount to be an interruption, it has to be interrupted.

Toussie says there are very few continuous crimes. It is only continuous crime if the Statute says it is continuous crime.

It can not be a continuous crime because there are three objects; one car in January 1974, one car in May 1974 and one lot of truck parts in May 1978; these are not integrally related so that one cannot tell one from the other. Like three bushels of soybeans in a bin that contains one hundred bushels of beans. Or in a copper case where each little bar, about 20 pounds per bar, is integrally related so that one can not distinguish one bar from the other bars.

In Johnson it was decided that three motor vehicle did not constitute a single count of conspiracy.

In Lindsey case, again, it was decided that three cars does not constitute a single count of conspiracy.

In *Helfin v. U.S.*, 3 L Ed 2d 407; *U.S. v. Gaddis* 47 L Ed 2d 222; *Milanovich v. U.S.* 5 L Ed 2d 773; *Gilbert v. U.S.* 51 L Ed 2d 578 and 573 F 2d 346, all of them say that one cannot be guilty of "stealing" and at the same time be guilty of receiving. This has to be true in a single count of conspiracy. If one cannot be guilty of the crime he cannot be guilty of conspiracy to commit the crime.

The only way for government to avoid the Statute of Limitations is by giving an instruction to the effect that one overt act had to be proved within the 5 year period of time prior to the date of the return of the indictment. This is explained in U.S.V. Novak

Payne contends that he stands convicted of potential overt acts prior to the Statute of Limitations date of August 22, 1974

QUESTION 3

Reason relied on for allowance of the Writ

3. Court was required to grant a mistrial when co-defendants plead guilty after voir dire of the jury. Trial started on Monday morning, October 8, 1979, with all seven defendants present to stand trial.

It is one of the basics essential elements of the jury system that a defendant is to be tried by a fair and impartial jury. If all the prior television, radio, and newspaper coverage did not make this jury prejudicial, the reading of the whole complete indictment to them had to have an effect of gerring the jury started on a very bias way of thinking toward Payne. It is easy to say for an individual to put out of their mind the memory of a particular thing but once there is the impression, it is not easily forgetten.

It is the Court's duty at all times during the course of the trial to be on guard to see it that a defendant gets a fair and impartial jury trial.

Payne contends that the jury should have been dismissed in his case as it was in the case of *United States v. Rathburn*, 472 F. Supp. 17 (D. Ver., 1979)

On October 9, 1979, the defendants all plead guilty except Payne. The jury had been seated and sworn in on Monday, October 8, 1979. The jury was read the complete indictment on Monday, October, 8, 1979. This was forever impressed into their memory. At this time or point in the proceedings in the Rathburn case the jury was dismissed as the jury should have been dismissed in the Payne case.

The 6th amendment to the Constitution of the United States says in part "..., by an impartial jury of the State and district wherein the crime shall have been committed,..."

For further proof of the fact that Payne owed juryman Singer some money as a result of Mr. Singer's preparation of an abstract for Payne. For some reason, Mr. Singer did not reveal this fact during the voir dire of the jury. One can only speculate as to how or why this occured. The bill from Mr. Singer was over due, maybe, at the time of the trial.

QUESTION 4

Reason relied for allowance of the Writ

4. Defence witness was impeached by defendants prior misdemeanor conviction that is later reversed. Title 28, Federal Rules of evidence, Rule 609 says that a misdemeanor with punishment of less than one year is not to be introduced for impeachment purposes.

Mr. Lucas was put on the stand to testify about the fact that the R. Fox truck was a beautiful red shiny short wheel based truck when delivered to him during March, 1978 so that he could lengthen the frame in order for the truck to accept a bed that was about three feet longer than the present frame would accept. Since Erbecker had never talked to this witness prior to trial week, it was difficult for me to convey the purpose of the Lucas testimony to Erbecker during the course of the trial. Lucas could and did say that the truck looked real clean when it was delivered to his place of business.

Mr. Hayes, Indiana State Police, filed charges against Payne in the Jackson County Court of Indiana in regards to a motor vehicle identification "HAS" been removed. Some of Indiana's background in the auto thief section of the State Police should be explained. Before Mr. Hayes and his associate there was a man who headed the department by the name of Mr. Finney (? spelling). For years Mr. Finney ran the department with the understanding that it was permissible to change from one part of a motor vehicle to another part of like vehicle the identification as Payne did in the chevrolet truck case tried in Jackson County. In about 1973 Mr. Hayes and his associate took over the department and even thought the laws were not changed, Hayes and his associate tried to change the way in which the laws were enforced as in the case of the Jackson County chevrolet truck case.

This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way. From *Campbell v. United States,* 176 F. 2d 45 comes the quote as follows: "If the judgement of conviction is later reversed, the defendant has suffered unjustly and irreparable, the prejudice, if any, caused by the disclosure of the former conviction. We therefore hold that the pendency of an appeal prevents the prosecution from proving a previous conviction for impeachment purposes. "Id. at 47; accord: *United States v. Mitchell,* 397 F. Supp. 184 (D.C., 1974) Payne's conviction was reversed and he has been made to suffer from a grievous wrong as a result of this erroneous presentation in front of the jury. Court made a mistake in letting it before the jury and now that mistake is compounded by the fact Payne was ordered acquited, by the Indiana Court or Appeals.

Erbecker said that he thought that the one big item in the trial was the presentation of this erroneous case from the Jackson County Court, he said that it was the main turning point. It was wrong for this to be presented in front of the jury.

QUESTION 5

Reason relied on for allowance of the Writ

5. Court erred in excluding relevant evidence. If the defense can not present evidence to show that he is acting in a legitmate manner, how does one fo about defending himself? The Everitt Fox, no relation to R. Fox, testimony was to show the court and the jury that six hundred was a fair price to pay for a whole truck which is a better deal than six hundred for some allegedly parts from a truck. The 7th Circuit Appeals Court missed the reasoning behind the six hundred dollar purchased truck from Detroit, Michigan because it does very much show what the price for vehicles cost the business located at Austin, Indiana.

Payne could and would have presented similiar evidence from other surrounding areas such as Indianapolis, Indiana and Evansville, Indiana but the hoped for evidence was precluded when the E. Fox testimony was denied being admitted to the jury. This thirteen percent of Redbook price is the approximated. price that is paid for Salvage motor vehicles for the Payne business from all territories from which salvage is purchased.

One of the essential elements for conviction of conspiracy is knowledge that the items were stolen. This evidence would have show that Payne did not know that the truck parts were stolen by the consideration of the price. The elimination of this evidence precluded any concrete evidence if something is stolen.

In order to be relevent and therefore admissible, a particular item of evidence need not be conclusive as to an issue, but what is necessary is only enough rational connection with the issue in question to be a factor contributing to the answer.

The government presented evidence that Payne purchased parts at fifty percent of their market value, cars at thirty percent of their market value and then more truck parts at thirty percent of their market value. Payne was denied the opportunity to present evidence that he regularly purchased motor vehicle ar thirteen percent of their market value.

Title 28 Federal Rules of Evidence, Rule 402 controls this situation as well as Rule 401.

QUESTION 6

Reason relied on for the allowance of the Writ

6. A witness for the defendant was impeached by proof of a prior convictor; Rule 609, again. The reasoning in this is very similiar to the reasoning in Question 4. Here again the conviction is a misdemeanor where punishment is less than one year and it does not involve dishonesty or falsehoods, as for as the witness A. Howard is concerned. In the trial A. Howard was asked if he knew the man seated there at the government counsel table with the white hair. A. Howard said that did not know Mr. Fred Hays. There was no reason for him to know Mr. Hays because the ticket for following to closely was issued by another officer other than Mr. Hays. (It was said off the record or inferred that Mr. Hays was the arresting officer). This was one more time that a defense witness was made to look bad because of improper acts of the court and the U.S. Attorney. Had there been proper separation of witnesses, this white wash attempt may not have happened. Had there been proper direction from the court by not over ruling the objection from Erbecker, this would not have taken place. The court let this in evidence to ascertain whether this defendant has a failing memory about it. One thing was certain as the record will verify the judge had a failing memory because this A. Howard was not a defendant.

From *United States v. Millings,* 535 F. 2d 121 (D.C., 1976) is shows that carrying a handgun without a license is not a crime which involves dishonesty or false statements, in Indiana it does not carry a sentence in excess of one year.

The Court abused the trial procedure by permitting this to be presented to the jury. Further there were no necessary findings by the court before this information was presented to the jury.

QUESTION 7

Reason relied on for the allowance of the Writ

7. Denial of due process as guaranteed by the 5th and 6th amendments upon sentencing with reliance upon an erroneous Presentence investigation report.

About the middle of December, 1979, Payne arrived at Lexington Federal correctional institute for a study performed by Mrs. Cook, Dr. Earl Washington, and John Johnson who was the head of the study team. Mr. Johnson wrote a report recommending the quanity (as the court requested) of sentence to asses upon Payne. Mr. Johnson used the one count conspiracy portion from the indictment. Mr. Johnson, along with the concurrence of the rest of the team, recommened two years probation as the sentence for Payne to receive. Mr. Johnson's report, along with the backup report of Dr. Washington's, went to a Mr. Kennebrew who read the erroneous presentence investigation report (hereafter reffered er as PIR). After reading the three reports, Mr. Kennebrew dictated to Mr. Johnson that he would have to change his recommended quanity of sentence to be a three year executed sentence instead of the original two year probation. Mr. Johnson followed Mr. Kennebrew's dictate. Judge Holder followed the recommendation which he received. With an erroneous PIR based recommendation, the court sentenced Payne based upon erroneous information that is contrary to the Sixth as well as the Fifth amendment of the Constitution of the United States and Rule 32 of the Federal Rules of Criminal Procedure

On the original sentencing of November 9, 1979 Payne said that the PIR was false and that he disavowed the information that was contained therein. Later, on March 14, 1980 the court still sentenced Payne based upon the recommendation made as a result of the erroneous PIR. Again, in the July, 1980 parole hearing, Payne was given two years instead of one year because of the erroneous PIR. This erroneous PIR has caused irrepairable harm to Pyne. Payne was found guilty of conspiracy of two motor vehicles and some parts; not the three hundred thousand dollars in cars and parts as the erroneous PIR indicates. Further, nothing about this three hundred thousand dollars in cars and parts was mentioned during the trial. Payne contends that had the government had any proof of these allegations that some charges would have been filed against Payne that included these factors.

QUESTION 8

Reason relied on for allowance of the Writ

The indictment is fatally defective in the overt acts of 1978; it does not state a 18 U.S.C. 2312 and/or 2313 crime. It does not meet Constitutional requirements and the court did not have jurisdiction in Southern Indiana.

Evidence was offered at trial that Mr. Hines instructed his son to deliver the parts to Orville Payne. However, his son was never called upon to testify, under oath at trial, that the delivery was, in fact, completed. It was the opinion of Mr. Hayes that the truck cab which was supposedly delivered to Orville Payne was installed on the truck which Robert Fox purchased from Orville Payne. The validity of this theory was disproved by testimony from Mr. Colwell, Robert Fox, Albert Thormeyer, Alva Lucas, and Arnold Howard. Mr. Colwell testified that in his capacity as an auto-body repairman that he had inspected the Robert Fox truck the night before his testimony and that it still had on it the parts that he had installed in March and/or April 1977 (over a year prior to the alleged theft in May 1978 of a furniture van truck). Further, Mr. Fox stated that he had written a check to Orville Payne in February 1978 (68 days prior to the alleged theft of furniture van truck) for the purchase of the truck. In addition, Mr. Lucas stated that he had lengthened the frame of the truck for Mr. Fox in March and/or April of 1978 (again prior to the alleged theft). Lucas also testified that the truck had a fairly new looking paint job at the time and that it was red in color. Mr. Howard testified that he had unsuccessfully attempted to purchase the same truck from Mr. Payne in the fall of 1977, and at that time the truck was red in color.

The testimony of R. Fox, Colwell, Thormeyer, Lucas and Howard disproves the "theory" of Mr. Hayes that parts on the truck purchased by Mr. Robert Fox from Orville Payne came from an alleged theft which occurred after the sale to Mr. Fox. The very timing is the undoing of the Hayes "theory". The testimony of these men further disproves any

allegation that there occurred any "Interstate Transportation" of either the parts or the whole of this vehicle or any vehicle in May, 1978.

The motor vehicle has to proved to have been within or gone thru the jurisdictional district where the prosecution is started. These is no proof that has not been refuted to show that the motor vehicle is or was or had been within the jurisdiction of the court in Southern Indiana from the their of a truck that occured in Louisville, Kentucky about May 5, 1978.

Payne would like to explain each of the four overt acts as described in the indictment, in regards to the 1978 overt acts. The acts are numbered 16 thru 19. Act will be first and explanation will be second.

Overt act 16. "On May 5, 1978, Terry Heuser stole a 1977 Ford F350 van truck in Louisville, Kentucky and delivered this vehicle to Joseph Hines in Louisville, Kentucky.

Explanation: This act shows that there is no "interstate transporation" of a motor vehicle. It all happened in Kentucky; totally within the boundarys of the state of Kentucky. No federal crime but only a state crime depicted here.

Overt act 17. On or about May 12, 1978, Joseph Hines sold Orville Payne a cab, engine, transmission, and running gear from a stolen 350 Ford van truck for approximately six hundred dollars.

Explanation: These parts are not a motor vehicle. Therefore not covered by 18 U.S.C. 2312 and 2313. A motor vehicle has to be capable of self propelling itself. It must move on it's own wheels. From *United States v. Shanks,* 521 F. 2d 83 on page 86 it says "regardless of the breath of interpretation, transportation or receipt of parts alone has not been held to be sufficient." When this act says that parts were sold, this totally, on the face of it shows that it is not a motor vehicle.

Overt act 18. On or about May 13, 1978, Orville Payne directed Joseph Hines to deliver the stolen Ford van truck

parts previously described in paragraph 17 herein to Gary Surber.

Explanation: The only evidence that was offered during trial that this occured was that a phone call was made from Hines Body Shop to Payne's place of business. There were no recordings to show that Payne talked to anyone. Further this does not show a 18 U.S.C. 2312 or 2313 crime.

Overt act 19. On or about May 13, 1978, Joseph Hines caused to be delivered the stolen Ford F 350 van truck parts previously described in paragraph 17 herein to Gary Surber in Austin, Indiana.

Explanation: These parts were supposed to have been put onto a truck that was sold to a local customer of Paynes. However, the truck was repaired in March & April of 1977 which is over one year and a month before the alleged thief in Louisville, Kentucky on May 5, 1978. Gary Surber did not testify during the trial, however, he has since told Payne that he has never ever had any parts from a F 350 Ford van truck, Period.

In *United States v. Shanks*, 521 F 2d 83, on page 86 it says the following quote:
"Regardless of the breath of interpretation, transportation or receipt of parts alone has not been held to be sufficient".

Overt acts 16 thru 19 show conclusively upon the face of the indictment that:
(1) There is no motor vehicle (overt acts say that parts were delivered).
(2) That was involved in in interstate commerce from the Commonwealth of Kentucky to the state of Indiana.
(3) The government has failed to state a federal crime in the overt acts for 1978.
(4) With no federal crime alleged within the time frame of August 22, 1974 to August 22, 1979, this indictment has to be declared fatally defective.

Case law exist to show the following facts:
(1) Parts don't move on it's own wheels which a motor vehicle must do.

(2) Court must construe the statute as it is written, Court does not have the privilege of "writing into" a statute what the court wishes was therein.
(3) Legislative history shows that parts are to be considered a state crime and not a federal crime.

Title 18 U.S.C. 2312 & 2313 are separate and distinct crimes; with this in mind then it is impossible for them to be part of a one count continuous act conspiracy. The Milvanovich, Helfin, Gaddis, and Gilbert cases all say to the effect that one can not be guilty of the "Thief" of one object as well as the "receipt" of that same object. The one count conspiracy has to be directed toward one object. Therefore, considering that a one count conspiracy has to be directed toward one object and 2312 & 2313 has to be directed towards two objects, then it is impossible for a one count conspiracy to exist that is directed toward two or more objects based upon 2312 & 2313. Each motor vehicle has a separate and distinct motor vehicle identification number, therefore it has to be concluded that each motor vehicle is a separate object.

Payne contends that this one count conspiracy should be a three count conspiracy. One reason for it to be presented as a one count conspiracy was to attempt to avoid the statute of limitations.

With the testimony of E. Colwell butressed with R. Fox, Lucas, Thormeter and A. Howard, Payne contends that he has proven to the court that the overt acts of May 1978 did not happen.

Payne believes that had he been given an impartial jury, court, and trial with competent assistance of counsel; he would be an innocent man spending the last sixteen-plus months in prison for a crime which he did not commit. Payne was denied a trial in the State and District where in the crime shall have been committed, because there is no federal crime stated in overt acts sixteen through nineteen.

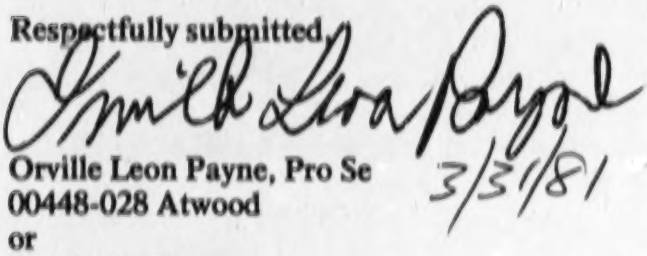
Due to the lack of proper assistance of counsel in the orginal trial, Payne has to use another incompetent counsel for this appeal to this Court, he has to attempt a petition for a Writ of Cetiorari by himself.

Payne contends that the "Hornet's Nest" through which he was put is a total MOCKERY of JUSTICE.

CONCLUSION

For the foregoing eight reasons, a Writ of Certiorari should be issued to review the judgement and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,



3/31/81

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APPENDIX A

Excerpts from cases in support of Question 1 presented for Review

Holloway v. Arkanasas, 435 U.S. 475, and 55 L Ed 2d 426.

In L Ed 2d at Page 427

"A defendant in a criminal proceeding may waive his right to the assistance of an attorney unhindered by conflict of interest."

"The Sixth Amendment's guarantee of the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

at Page 435

"Second, defense attorney's have the obligation, upon discovering a conflict of interests, to advise the court at (435 U.S. 486) once of the problem."

at Page 441, Footnote 4:

"...a later motion may be appropriate if the conflict is not known or does not become apparent before trial proceeds. To guard against strategic disruption of the trial, however the court may require a substantial showing of justification for such midtrial motion."

United States v. DeBerry, 487 F 2d 448, 453 (2d Cir. 1973):

"When such a motion is made, supported by a satisfactory proffer, the trial court is under a duty to conduct "the most careful inquiry to satisfy itself that no conflict of interest would be likely to result and that the parties involved had no valid objection."

Cuyler v. Sullivan, 64 L Ed 2d 333

at Page 337:

"...; unless the trial court fails to afford such an opportunity, however, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel, since such a presumption would preclude miltiple representation even in cases where a COMMON DEFENSE GIVES STRENGTH AGAINST A COMMON ATTACK."

at Page 334

"...and must at least affirmatively advise a defendant that joint representation creates potential hazards which the defendant should consider before proceeding with the representation..."

at Page 337

"...the right to counsel in the Sixth Amendment prevents the states from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."

United States v. Foster, 469 F. 2d 1 (1st Cir. 1972)

First Circuit requires Foster warnings before attorneys are permitted to operate jointly. There were no Foster warnings given in Payne trial.

APPENDIX B

Excerpt from Toussie in support of Question 2 presented for Review

Toussie v. United States, 397 U.S. 112, 25 L Ed 2d 156:

from 25 L Ed 2d at Page 158:

With respect to deciding when a criminal statute of limitations begins to run as to a particular offense, the principles that such statutes of limitations are to be liberally interpreted in favor of repose, and that they normally begin to run when the crime is complete, indicate that the doctrive of continuing offenses is only to be applied in limited circumstances, since the tension between the purpose of a statute of limitations and the continuing offense doctrive is apparent, the latter, for all practical purposes, extending the statute beyond its stated term; these considerations do not mean that a particular offense should never be construed as a continuing one, but do require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

Toussie is a case where the boy failed to register for the draft; the Supreme Court decided that it was not a continuing offense from his age 18 until after age 26.

APPENDIX C

Excerpt from Rathbarn in support of Question 3 presented for Review

United States v. Rathburn, 472 F. Supp. 17 (D. Ver. 1979):

from Page 18 and 19:

Trial began on December 4. On December 5, however, defendants VanBlericom and Kloberdance changed their pleas as to counts two and three from "not guilty" to "guilty". After the court accepted the change of pleas, a discussion ensuded as to whether the jury could fairly try the remaining co-defendants. With the acquiescence of all parties the court declared a mistrial and excused the jury. The next day the court empaneled a new jury and began petitioner's second trial.

APPENDIX D

Excerpt from Mitchell in support of Question 4 presented for Review

United States v. Mitchell, 397 F. Supp. 184:

from Page 184 and 185:

Government would not be permitted to cross-examine defendant's character witnesses with respect to whether they had heard that defendant had been convicted of perjury, where defendant had appealed that conviction and the appeal was pending.

Rule 609 very specifically says that a misdemeanor shall not be used.

APPENDIX E

Statement in support of Question 5 presented for Review

This is not the time and the place but somewhere in this instrument, Payne wants to state that he has been taught to be an honest Christian and that he is not guilty of this charge as set forth in this indictment. Thanks.

APPENDIX F

Excerpt from Millings in support of Question 6 presented for Review

United States v. Millings, 535 F 2d 121:

from Page 121 and 122:

Impeaching defendant by asking him, over objection, whether he had preciously pled guilt to a charge of carrying of possession of heroin was impermissible under federal rule, since the offenses about which defendant was cross-examined were misdemeanors not punishable by death or imprisonment in excess of one year, and since, an intent to deceive or defraud not being an element of either, they did not involve "dishonesty or false statement." Federal Rules of Evidence Rule 609(a), 28 U.S.C.; D.C.C.E. 22-3204, 33-402.

APPENDIX G

Excerpts from The Presentence Investigation Report

PUBLICATION NO. 105, THE PRESENTENCE INVESTIGATION REPORT

This is from the Division of Probation, Administrative Office of the United States Courts, Washington, D.C. 20544, January 5th 1978 (revised September 25th, 1978), and for sale through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, Price $2.30, Stock No. 028-004-00012-5. The PIR's primary purpose is to aid the court in determining the appropriate sentence.

Further on Page 26, Pub. 105, Appendix C quote:

> ".....In *Townsend v. Burke*, 334 U.S. 736 (1948)...the Court ruled invalid the sentencing of a defendant based on assumptions about his criminal record that were materially false."
>
> Further on the same page quoted:
>
> "THIS RULE OF ACCURACY APPLIES TO ALL DATA IN A PRESENTENCE REPORT BECAUSE IT IS A PATENT VIOLATION OF DUE PROCESS TO SENTENCE ON THE BASIS OF MATERIAL UNTRUE INFORMATION."
>
> The materially untrue information is: (1) "Gross profit" instead of "gross income";

The materially untrue information is: (1) "Gross profit" instead of "gross income"; (2) Surber and the three Spencer brothers affidavits; and(3) No mention of who, what, where or when in regards to the"100 cars and parts valued at $300,000."

APPENDIX H

Excerpts from cases in support of Question 8 presented for Review

from *United States v. Gaddis,* 424 US 544, 47 L Ed 2d 222:

at page from L Ed 2d:

2113(b) Making it a crime to take, within intent to steal, anything of value from a bank, and 2113(d) making it a crime to assault or put in jeopardy the life of any person by use of a dangerous weapon in committing or attempting to commit an offense under 2113(a) or (b) cannot also be convicted of receiving or possessing the proceeds of the robbery in violation of 2113(c), making it a crime to receive or possess anything of value knowing it was taken from a bank in violation of 2113(b).

Gilbert v. United States, 430 US 902, 51 L Ed 2d 578 & 573 F 2d 346

On two counts of theft from interstate freight shipment and on two counts of possession of such goods, and he appealed. The Court of Appeals, 537 F 2d 118, affirmed. The United States Supreme Court, 430 U.S. 902, 97 SCt. 1169, 51 L. Ed 2d 578, vacated and remanded with directions. Following remand, the Court of Appeals held that defendant could not properly be convicted of both the thefts themselves as well as possession of the goods stolen therein and vacated and remanded with direction, 533 F 2d 990.

United States v. Johnson, 515 F 2d 730 (7th Cir. 1975)

It was further held that variance between indictment and proof as to number indictment and proof as to number of conspiracies required reversal of conviction on conspiracy count, but that such error did not taint verdict on the substantive counts.

Affirmed in part and reversed in part.

United States v. Lindsey, 602 F 2d 785

The indictment charged defendant and eight others of one overall conspiracy whereas the evidence adduced at trial showed that defendant was involved only in a smaller, separate conspiracy. The question for our consideration is whether this variance between indictment and proof requires reversal. Because there is a significant possibility that defendant was prejudiced by this error, we reverse.

Milanovich v. United States, 365 US 551 2c Ed 773

In a prosecution under 18 USC 641 of one accused of (1) stealing money from the United States, and (2) receiving and concealing part of the same money, it is error not to injury that it may find the accused guilty of either larceny or receiving, but not of both.

APPENDIX I

Opinion and Judgement of the United States Court of Appeals for the Seventh Circuit

In the
United States Court of Appeals
Forthe Seventh Circuit

Nos. 79-2393 and 79-2561

United States Of America,

Plaintiff-Appelle,

V.

Orville Leon Payne,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division.
No. NA 79-7-CR—Cale J. Holder, *Judge*

ARGUED SEPTEMBER 10, 1980—DECIDED DECEMBER 10, 1980

Before Pell and Cudany, *Circuit Judges,* and Dumbauld,* *Senior District Judge.*

DUMBAULD, *Senior District Judge.* Appellant was convicted (under the general conspiracy statute, 18 U.S.C. 371)1 of conspiring to cause transportation of stolen motor vehicles from Kentucky to Indiana in violation of 18 U.S.C. 2312 2

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

1 "If two or more persons conspire ... to commit any offense against the United States ... and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

and to receive, conceal, and sell such vehicles in violation of 18 U.S.C. 2313 3. Of nineteen overt acts alleged, nos. 11-15 were withdrawn from consideration by the jury. Eleven other counts involved other defendants and included one charge of conspiracy and ten charges of violation of 18 U.S.C. 2312 and 2313. Appellant was named only in Count I, charging conspiracy with Jon Scott, Gary Surber and other persons known and unknown. When the case went to the jury the other defendants had been permitted to enter guilty pleas and appellant was the only remaining defendant. Overt acts nos. 16-19 relate to acts occurring in May, 1978, within the the five year4 period before August 22, 1979, when the indictment was returned. The other overt acts involved took place between January and May, 1974. Appellant advances several contentions why his conviction should be reversed.

1. *Statute of limitation.* It is argued that each stolen vehicle was the subject of a separate conspiracy and that the overt acts in 1978 could not reactivate a conspiracy dormant since 1974.

But the evidence showed that the nature of the arrangement between the conspirators was the Hines and Scott would steal cars "to order" in conformity with the needs and requirements of appellant's business. Appellant provided the market or demand,while his co-conspirators handled the "supply side"

2 "Whoever transports in interstate or foreign commerce a motor vehicle ..., knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

3 "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle..., moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen shall be fined not more than $5,000 or imprisoned not more than five years, or both."

4 A five year statute of limitations applies. 18 U.S.C. 3282.

and furnished stolen cars of the make and model ordered. Appellant preferred buying from an out-of-town source (the "chop shop" operated by Hines was in Louisville, Kentucky) and also required delivery of purchased stolen vehicles at a farm implement store five miles away rather than directly to his own place of business. He supplied his customers the stolen vehicles together with titles and vehicle identification numbers from total loss vehicles purchased as salvage from insurance companies. Hence the stolen car and the description of the salvage car had to match, and appellant would give Hines orders for particular makes and models as needed.

In May, 1978, appellant wanted a Ford truck to be used in repairing a garbage truck which appellant had purchased. Hines supplied appellant with a stolen Ford furniture truck. The stolen Ford was not driven to appellant's place of business under its own power, but was cut up into pieces which were loaded on a Chevrolet truck owned by Hines and delivered to the destination specified by appellant. These transactions were recited in overt acts nos. 16-19.

This Court has held that the duration and identity of a conspiracy depends upon its terms. *U.S. v. Novak*, 448 F. 2d 134, 139 (7th Cir. 1971). In the case at bar it is clear that the parties contemplated a continuing relationship of demand and supply, depending upon the current needs of appellant's business. Periods of dormancy could exist between transactions without disrupting or termination the arrangement. The situation was similar to that which would exist if a manufacturer and a chain store conspired to violate the Robinson-Patman Act by giving and receiving prohibited discounts, but long periods of time might elapse between orders placed with the maufacturer. As another example, a national bank and its director, to be used in furtherance of his speculations on the stock market. Here too, long periods of time might elapse between one loan and the next, depending upon the exigencies of the borrower's requirements.

Appellant also argues that transportation of stolen truck *parts* across a state line does not constitute the fobidden transportation of a stolen *motor vehicle* across a state line. As the

renowed Dean Roscoe Pound of the Harvard Law School once said to the writer of this opinion during a moot-court case, "That argument is ingenious but does not hold water."

We are not talking about transportation of replacement parts, manufactured as separate item, independent of the entire motor vehicle. We are dealing with parts which were once constituent portions of a total vehicle, and which have been severed therefrom by participants in a criminal enterprise.

It would contravene and frustrate the policy of the Dyer Act and the intent of Congress in enacting it if car thieves could escape prosecution by taking the simple precaution of cutting the vehicles up into pieces. *U.S. v. Shanks*, 521 F. 2d 83, 85-86 (7th Cir. 1975). The testimony in the case at bar shows that appellant's dealings related to entire vehicles on a large scale. He did an annual business of $180,000; he was not a petty peddler of stolen hub caps.

By analogy, common sense teaches that if it were illegal to transport in interstate commerce chickens infected with certain diseases ot game killed in violation of conservation laws, a defendant could not thwart the law by packaging legs and breasts separately, or dismembering a deer killed out of season.

2. *Right to counsel.* Appellant also advances a number of procedual points. It is argued that he was deprived of his right to counsel because two of his three attorneys withdrew in order to represent co-defendant Surber, and then were not permitted to resume representation of appellant after surber decided to plead guilty. The Court thought Surber might be called as a Government witness, but he was not.

The arrangement that appellant's two original attorneys should not continue to represent him but should represent Surber was consented to by appellant, after consultation with counsel.

We cannot say that the Sixth Amendment was violated. Appellant was adequately represented by counsel of his choice.

He did not diligently demand, after Surber decided to plead, that the two lawyers who had represented Surber return to his defense. Perhaps no real harm to the orderly conduct of proceedings would have resulted if such a demand had been made and granted, but we cannot say that the trial court abused its discretion in maintaining the status quo and proceeding in accordance with the previously agreed upon arrangement which appellant had accepted.

The basic factor in conflict of interest situations is to ensure that each defendant receives independent advice based upon his own self-interest rather than advice which may be predominantly dictated by the interest of other defendants.

The classic case is presented by the situation of corporate executives and employees called before a grand jury in an antitrust proceeding. If the company lawyer represents them all, it would save expense and no harm would result if all the potential defendants are *in paridelicto*. But if some of them are mere underlings involved only peripherally in the offenses under investigation, and have been summoned or indicted merely with the hope that pressure to cooperate with the Government may be brought to bear upon them, then there may well come a time when such a peripherally involved participant may find it to his advantage to become a tattletale and accept the Government's offer of immunity or leniency. In making this crucial decision he is entitles to legal advice evaluating the situation from the stand point of his own individual interests, rather than advice that may be tainted by consideration of the interests of other (more important or lucrative) clients of the lawyer. Such independent protection of the interests of each client is assured by their representation by separate counsel. Appellant in the case at bar agreed to such an arrangement, and received the benefits of it. There has been no prejudice to his constitutional rights.

3. *Mistrial.* Appellant argues that a mistrial should have been declard when the six other defendants in the case decided to plead guilty, leaving appellant as the only defendant remaining to put himself upon the country. It is plain that this contention is untenable.

The trial court clearly explained to the jury that the trial would be limited to issues arising under Count I of the indictment and that the jury's task would be to determine the guilt or innocence of appellant under the allegations of that count.

The weakness of this argument is shown by the fact that it was not urged at the trial, as counsel candidily concedes (Brief,p. 34), but feebly and vainly asserts that it involves fundamental error and that the trial court should have declared a mistrial *sua sponte*. We find no mert in this contention.

4. *Impeachment of witnesses.* A character witness for defendant was called to testify regarding appellant's reputation for honesty and being a law-abiding citizen. Upon cross-examination the witness was asked if he knew of appellant's conviction 5 in state court for unlawfully selling an automobile, the identification number of which had been removed; and if so whether that would change his opinion as to appellant's reputation. The witness responded in the negative to both questions.

It seems clear that the trial judge was correct in holding that the defense had "opened the door" to this line of inquiry by putting in issue appellant's reputation for the trails of truthfulness and law-abiding citizenship. Rule 405(a) of the Federal Rules of Evidence expressly permits cross-examination with respect to specific instances of conduct. 6

It is significant that appellant raised no objection at the trial to these questions. The court also charged with clarity that evidence of other offenses could bot be considered as any proof what so ever of appellant's guilt of the charge upon which he was being tried.

5 The conviction was subsequently reversed on appeal, but both sides agree that that circumstance is immaterial.

6 It is also debatable whether removal of a vehicle identification number involves "dishonesty" **vel non**. Appellant's certitude that Rule 609(a) would exclude reference to such a conviction may be overly optimistic.

A defense witness denied knowing a police detective seated at counsel table who was pointed out to him. The detective happened to have been the arresting officer when the witness was convicted in Indiana earlier in the year for carrying a pistol without a permit after being stopped for "tailgating" another truck. The trial judge correctly ruled that to follow up the statement of the witness by testing his recollection it was proper to ask if he had been convicted in Indiana during the twelve months last past.

5. *Exclusion of evidence.* Appellant complains of exclusion of evidence that in Detroit on a dozen or so occasions 7 he bought automobiles at a substantial discount from "redbook value.

Market prices in Detroit would seem to have dubious relecance to prices at a different time and place. Prices of cars coming to Indiana from Kentucky would seem to constitute the pertinent market in the case at bar.

The only purpose of the preffered prices was to negate the inference that defendant knew he was buying "hot merchandise" or stolen cars because the price he paid was less than the "redbook" Value of the cars purchased. The weakness of that inference could adequately be dealt with in argument to the jury without proof of what prices in Detroit might have been at some other time. There was abundant evidence in the record from which the jury might have drawn a more solid inference of appellant's guilty knowledge: such as his discussion of a "better way" to rebuild damaged cars (by substituting other cars in their place and supplying titles and identification numbers from the salvaged cars); his unwillingness to buy from local sources since they "would steal them right down the road" close to his place of business; and his unwillingness to take delivery of purchased cars at his place of business during business hours.

7 According to the Government's brief (p. 35) the exhibit offered showing prices paid in Detroit covered only five vehicles, and a period of time different from that involved in the indictment.

Exclusion of the Detroit prices was harmless, even if the evidence was regarded as remotely relevant, and was properly excluded under Rule 403 as its probative value was substantially outweigh by its tendency to cause confusion or undue delay and waste of time at the trial. The trial court did not abuse its discretion in excluding the proffered evidence.

For the foregoing reasons the judgement of the District Court is affirmed.

A true Copy:
Teste:

APPENDIX J

Part of indictment of which defendant Payne was charged

COUNT 1

The Grand Jury charges that:

From on or about January 1974, up to and including the filing date of this Indictment, in the Southern District of Indiana and elsewhere ORVILLE PAYNE, JON SCOTT, and GARY SURBER and other persons known and unknown to the Grand Jury did unlawfully, willfully and knowingly agree, and conspire to commit the following offenses against the United States:

1. To willfully and knowingly cause to be transported from the Commonwealth of Kentucky to the State of Indiana in interstate commerce and to aid and abet in the transportation from the Commonwealth of Kentucky to the State of Indiana in interstate commerce, stolen motor vehicles, knowing said motor vehicles to have been stolen in violation of Title 18, Unites States Code, Sections 2312, and 2.

2. To willfully and knowingly receive, conceal and sell and aid and abet in the receipt, concealment and sale of stolen motor vehicles that were then a part of interstate commerce from the Commonwealth of Kenturcky to the State of Indiana, knowing said motor vehicles to have been stolen in violation of Title 18, United States Code, Sections 2313 and 2.

OVERT ACTS

1. In January, 1974, ORVILLE PAYNE telephoned Joseph Hines to order a 1973 white Buick Century automobile to be stolen by Mr. Hines.

2. On January 23, 1974, Joseph Hines and JON SCOTT stole a 1973 white Buick Century automobile in Louisville, Kentucky.

3. On January 24, 1974, Joseph Hines and JON SCOTT transported a stolen 1973 white Buick Century automobile to ORVILLE PAYNE, 5c Auto Parts, Austin, Indiana.

4. On January 24, 1974, a stolen 1973 white Buick Century automobile, previously described in paragraph 2 herein, was transported, at the direction of ORVILLE PAYNE, to Mr. Wendell Miller at Wells-Deal, Scottsburg, Indiana.

6. In May, 1974, ORVILLE PAYNE telephoned Joseph Hines to order a 1972 brown Ford LTD Brougham to be stolen by Mr. Hines.

7. On May 24, 1974, Joseph Hines and JON SCOTT stole a brown 1972 Ford LTD Brougham in Louisville, Kentucky.

8. On May 24, 1974, Joseph Hines and JON SCOTT were directed by ORVILLE PAYNE to deliver a stolen brown Ford LTD to Wells-Deal, Scottsburg, Indiana.

9. On May 24, 1974, the stolen brown LTD Ford previously described in paragraph 7 herein was delivered to Wells-Deal, Scottsburg, Indiana, by JON SCOTT and Joseph Hines.

10. On May 24, 1974, ORVILLE PAYNE supplied Wendell Miller with a title and serial plate number from a salvaged 1972 brown Ford LTD BROUGHAM.

11. On May 5, 1978, TERRY HEUSER stole a 1977 Ford F350 van truck in Louisville, Kentucky and delivered this vehicle to Joseph Hines in Louisville, Kentucky.

12. On or about May 12, 1978, Joseph Hines sold ORVILLE PAYNE a cab, engine, transmission, and running gear from a stolen 350 Ford van truck for approximately Six Hundred Dollars.

13. On or about May 13, 1978, ORVILLE PAYNE directed Joseph Hines by telephone to deliver the stolen Ford van truck parts previously described in paragraph 12 herein to GARY SURBER.

14. On or about May 13, 1978, Joseph Hines caused to be delivered the stolen Ford F350 van truck parts previously described in paragraph 12 herein to GARY SURBER in Austin, Indiana.

All in violation of Title 18, United States Code, Section 371.

Clerk of the United States Court of Appeals for the Seventh Circuit

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